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No. 89-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE GOALS OF RULES 11 AND 41 ARE BEST SERVED BY ALLOWING THE UNFETTERED RIGHT TO DISMISS UNDER RULE 41(a)(1)(i)	4
II. THE IMPOSITION OF RULE 11 SANCTIONS SHOULD BE SCRUTINIZED UNDER VARYING STANDARDS OF REVIEW, NOT SOLELY UNDER AN ABUSE OF DISCRETION STANDARD	7
III. FED. R. APP. P. 38 AND 28 U.S.C. § 1912 PROVIDE ADEQUATE PROTECTION TO APPELLEES IN RULE 11 SANCTION APPEALS	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Foss v. Federal Intermediate Credit Bank, 808 F.2d 657 (8th Cir. 1986)	6
In re Matter of Yagman, 796 F.2d 1165 (9th Cir.), *reh'g denied*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987)	10
Kurkowski v. Volcker, 819 F.2d 201 (8th Cir. 1987)	6
Munson v. Friske, 754 F.2d 683 (7th Cir. 1985)	15
Pavelic & LeFlore v. Marvel Entertainment Group, —— U.S. ——, 110 S.Ct. 456 (1989)	3, 10, 13, 17
Pierce v. Underwood, 108 S.Ct. 2541 (1988)	14
Sibbach v. Wilson & Co., 312 U.S. 1, 16 (1940)	4
STATUTES AND RULES:	
28 U.S.C. § 1912	3, 15
28 U.S.C. § 1927	7
28 U.S.C. § 2072	7
28 U.S.C. § 2412(d)	14
42 U.S.C. § 1988	15
Fed.R.App.P. 38	3, 15, 16
Fed.R.App.P. 46	15
Fed.R.Civ.P. 1	4
Fed.R.Civ.P. 11	2, *passim*
Fed.R.Civ.P. 12	5
Fed.R.Civ.P. 41	2, *passim*
Fed.R.Civ.P. 52	10
Fed.R.Civ.P. 56	5

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SUMMARY OF THE ARGUMENT

The ultimate irony in the instant case is readily apparent: Petitioner is a law firm that was sanctioned for trying to represent a small corporate entity involved in litigation against major clothing manufacturers represented by a large law firm with infinitely greater resources, and sanctions were imposed after Petitioner extended the exceptional courtesy to Respondents of providing them with a preview of the class action complaint before filing it.[1] Despite the fact that Petitioner's coun-

[1] Petitioner's counsel provided Respondents' in-house and outside counsel with copies of the Complaint before filing and invited both sets of counsel to take as much time as they needed to examine the complaint and reply to Petitioner before any lawsuit was filed. Brief for Petitioner, at 14.

sel agreed to give Respondents as much time as they needed to reply to Petitioner before the class action complaint was filed, Respondents invited Petitioner to file the Complaint and only then came forward with a claim that Petitioner was in error on the facts.

At the direction of its client, Petitioner then dismissed the action before any substantive rulings had occurred or an answer or motion for summary judgment had been filed, only to find that it is now being charged with in excess of $20,000 in legal fees for Respondents' counsel for the District Court phase alone, to be followed by what will in all probability be substantially larger fees for the appeal and most likely even greater amounts for certiorari review if Respondents prevail here. And all of this occurred with no adjudication of liability in Respondents' favor and with an appellate court review that gave extraordinary deference to a district judge who never heard the case on the merits and waited nearly four years before ruling.

Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure contemplates that a plaintiff may decide, prior to a defendant's actually answering a complaint or moving for summary judgment, to terminate an action *without prejudice*. The rule encourages litigants to reconsider early whether litigation is in their best interest and to withdraw without penalty at a time when a defendant has not been substantially burdened. To permit Rule 11 sanctions to be imposed following a voluntary dismissal will discourage litigants from availing themselves of voluntary actions, encourage defendants to file Rule 11 motions early in litigation as an *in terrorem* device to deter suits and to create a potential conflict of interest between a plaintiff and plaintiff's counsel, and force courts to entertain satellite litigation that has little to do with the merits of the dispute that gave rise to the filing of a complaint.

Much as Respondents and their *amicus* Washington Legal Foundation ("WLF") try to portray Petitioner

and its *amici* as "anti-Rule 11," that is not the case. They recognize the need for the Rule, but, unlike Respondents and WLF, they also recognize that the Rules of Civil and Appellate Procedure embody other values beyond sanctioning attorneys for what a district judge finds, with the benefit of 20-20 hindsight, to be inadequate performance. It is this insensitivity to these other interests that pervades Respondents' brief and the rulings below and that forms the core reason requiring reversal on all three issues.

This case demonstrates the need for careful appellate review of the legal rules that district judges adopt and apply in the course of deciding upon Rule 11 sanctions. Here, Respondents have been unable in the District Court, in the Court of Appeals, and in this Court to demonstrate a single reason why Petitioner should be deemed responsible for expenses incurred by Respondents in moving to dismiss a Complaint, after Respondents invited Petitioner to file the Complaint and declined to discuss it before it was filed.

Finally, the many briefs filed with the Court conclusively demonstrate that there is no reason to believe that this Court intended Rule 11 to override Federal Rule of Appellate Procedure 38 or 28 U.S.C. § 1912. The appellate rule and statute are directly on point, and Respondents' argument for virtually automatic Rule 11 sanctions on appeal is an invitation to deter legitimate appeals for no good reason.

In *Pavelic & Le Flore v. Marvel Entertainment Group*, —— U.S. ——, 110 S.Ct. 456 (1989), this Court held that Rule 11 sanctions may be imposed only on the individual attorney signing the pleading, not the law firm. Although the award of sanctions against Petitioner constitutes plain error under *Pavelic*, the issues which the Court has agreed to review are substantial and should be decided to give Petitioner and the federal bar guidance on the interrelationship of Rules 11 and 41, the scope of appellate review, and the availability of automatic sanc-

tions on appeal. *See generally, Sibbach v. Wilson*, 312 U.S. 1, 16 (1940) (plain error).

ARGUMENT

I. THE GOALS OF RULES 11 AND 41 ARE BEST SERVED BY ALLOWING THE UNFETTERED RIGHT TO DISMISS UNDER RULE 41(a)(1)(i)

The facts of this case demonstrate why the legitimate interests of both plaintiffs and defendants are furthered by a holding that sanctions may not be imposed under Rule 11 following a voluntary dismissal under Rule 41(a)(1)(i). The goal of the Federal Rules of Civil Procedure is "to secure the just, speedy and inexpensive determination of every action." Fed.R.Civ.P. 1. This goal is best achieved if the parties or potential parties are encouraged to discuss disputes informally, to avoid unnecessary filing of lawsuits, and to reduce litigation costs. This is exactly what Petitioner tried to do and what Respondents tried to avoid.

Had Respondents called to Petitioner's attention any facts they believed negated the antitrust allegations in Petitioner's draft Complaint, they would have reason to complain of a failure on Petitioner's part to investigate those facts. But, Respondents chose not to disclose any of their factual claims during the unlimited time they had to review the draft Complaint and withheld their assertions until they filed their Motion to Dismiss and Rule 11 Motion. Such behavior is totally inconsistent with the goals of the Federal Rules of Civil Procedure and smacks of game-playing and tactical maneuvering.

What Respondents refuse to admit is obvious: When a defendant is given an opportunity, at little or no cost, to suggest to a plaintiff that the factual allegations in a complaint are in error, the earlier the defendant does so, the less likely it is that the defendant will bear any substantial costs if the plaintiff has made a mistake. A correlative point is equally obvious: if the plaintiff has provided the defendant with a copy of the complaint before it is filed, the defendant has a chance to avoid all litigation by pointing out deficiencies in the complaint before it is filed, and if the plaintiff heeds the warning of the defendant, the defendant will escape all of the costs which litigation inevitably entails; if the plaintiff refuses to heed the warning, the plaintiff will be charged with the resulting costs if the complaint violates Rule 11.

As Petitioner has argued in its opening brief, the purpose of Rule 41(a)(1)(i) is to permit a plaintiff to walk away from a case, without penalty, prior to the time that a defendant has been substantially burdened. If Petitioner's argument is accepted, defendants will be encouraged to discuss, voluntarily and informally, the allegations of a complaint, which will further voluntary dismissals before a defendant is burdened with the costs of filing an answer or a motion for summary judgment.[2] Petitioner's reading of the rules would reduce the costs of litigation for plaintiffs and defendants and remove the burden from overworked courts of ruling on unnecessary motions, including motions for sanctions.[3]

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[2] The Washington Legal Foundation argues as *amicus curiae* that, because Respondents filed affidavits with their motion to dismiss, that motion should be treated as one for summary judgment whose filing would preclude a dismissal without prejudice. It is clear, however, that Respondents chose not to label the motion as one for summary judgment, nor have they ever argued that it was one, and the district court did not treat the motion as seeking summary judgment. Moreover, Respondents' motion would have been defective on its face as a summary judgment motion for failure to include a Statement of Material Facts as to Which There is No Genuine Issue, as required by Local Rule 108(h). Furthermore, an actual summary judgment motion would have given Petitioner the right to seek discovery of Respondents before responding to the motion pursuant to Rule 56(f). Petitioner never had the benefit of discovery prior to voluntary dismissal in this case. These important practical differences underscore the rationale for the differing treatment under Rule 41(a)(1) of Rule 12 motions to dismiss and Rule 56 motions for summary judgment.

[3] Respondents erroneously suggest that only the Second Circuit supports Petitioner's argument. Brief for Respondent, at 21. In

If, however, Respondents' argument prevails, defendants will have every incentive to refuse to cooperate, to invite plaintiffs to file complaints, and to use Rule 11 as a club to penalize plaintiffs who have good faith bases for filing suit and who cannot avail themselves of compulsory process until suit is filed. As the Brief of Plaintiff Employment Lawyers Association as Amicus Curiae, at 4-5, demonstrates, plaintiffs in many cases cannot obtain the information they need without cooperation from the defendant prior to filing suit. Respondents' reading of Rules 41 and 11 threatens plaintiffs' legitimate interests by leaving them powerless to compel information from a prospective defendant and subject to sanctions if they have been unable to intuit the information that defendants are withholding prior to the filing of a complaint.

Moreover, if Respondents' view of Rules 11 and 41 prevails, Rule 41(a)(1)(i) cannot mean what it says—*i.e.*, there is no longer any guarantee that a dismissal will be without prejudice. Respondents' Brief at 26 n.9 concedes as much. Respondents recognize that their argument is so broad that it would require the Court to hold that although a plaintiff may dismiss without prejudice pursuant to Rule 41(a)(1)(i), pursuant to Rule 11 a district court can impose the sanction of dismissal with prejudice. This reading of the rules renders Rule 41(a)(1)(i) a nullity any time that a Rule 11 motion is filed.[4]

Respondents attempt to avoid the fact that there are two explicit exceptions for other rules (23(e) and 66) in Rule 41(a)(1)(i), but not for Rule 11, by claiming that if Petitioner's position is upheld, sanctions based on 28 U.S.C. § 1927 and the bad faith exception to the American Rule on attorneys fees would also be precluded. What Respondents fail to note is that Petitioner's argument is based on an interpretation of the language of Rule 41(a)(1)(i) and its relation to other rules, which cannot, consistent with the Rules Enabling Act, 28 U.S.C. § 2072, alter the effects of statutes like § 1927 or substantive rules on attorneys' fees. Therefore, Rule 11 sanctions are disallowed here, not because of an inherent defect in the rules, but because the balance struck in Rule 41(a)(1)(i) excludes Rule 11 sanctions as a price of voluntary dismissal.

II. THE IMPOSITION OF RULE 11 SANCTIONS SHOULD BE SCRUTINIZED UNDER VARYING STANDARDS OF REVIEW, NOT SOLELY UNDER AN ABUSE OF DISCRETION STANDARD

Rule 11 sanctions not only impose financial burdens on litigants and lawyers, but they also injure the reputation of counsel who are sanctioned. On its face, Rule 11 recognizes the need not to penalize lawyers for making good faith arguments "for the extension, modification, or reversal of existing law." But Rule 11 provides no guidance as to what standard should be employed by counsel who are asked to file suits based upon factual allegations

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fact, the Eighth Circuit has also held that a district court may not impose Rule 11 sanctions after a complaint has been voluntarily dismissed, *Foss v. Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir. 1986), although that Circuit permits Rule 11 sanctions to be imposed after a voluntary dismissal if a Rule 11 motion is pending before dismissal. *Kurkowski v. Volcker*, 819 F.2d 201 (8th Cir. 1987). To that extent, Petitioner disagrees with the Eighth Circuit: either Rule 11 permits sanctions following a voluntary dismissal or it does not. It is difficult to see why the pendency of a motion should be determinative. To make the Eighth Circuit's distinction is to encourage early filing of Rule 11 motions, a practice which Petitioner urges is most undesirable.

The Fifth Circuit has reasoned that Rule 41(a)(1) means what it says and prohibits post-dismissal proceedings. But, it has done so in cases that do not involve Rule 11. *See* Brief for Petitioner at 24.

[4] As set forth in Respondents' Brief at 21, only the First, Seventh and Ninth Circuits are unqualifiedly in accord with the District of Columbia Circuit on the interrelationship between Rules 11 and 41. Not one of these courts, however, addressed the issue that Rule 11 could be used to circumvent Rule 41(a)(1)(i)'s guarantee of a dismissal without prejudice.

and beliefs of their clients. The rule provides only that counsel should certify that a "reasonable inquiry" has been made before signing a pleading and that the pleading is not filed for any improper purpose. The facts of this case demonstrate the need for appellate review of the procedures used by a district court in Rule 11 proceedings, the importance of announcing that defendants who abuse Rule 11 may not benefit from it, and the unfairness of permitting Rule 11 proceedings to be continued indefinitely and resurrected by a district court without explanation.

Prior to filing the Rule 11 motion, Respondents had absolutely no knowledge of the information possessed by Petitioner when the Complaint was filed. Before the District Court argument on the Rule 11 Motion, Petitioner filed affidavits of two attorneys working for Petitioner, including its senior partner. These affidavits clearly stated that the investigation into Respondents' practices was initiated on the basis "of information received from principals of our client," (J.A. 22) and that the clients, experienced in the men's clothing industry, informed Petitioner of Respondents' exclusive sales practices. (J.A. 25).

Moreover, the affidavit of Mr. Cooter, the senior partner, indicated that his clients had advised him that Respondents had dealt with Hart Schaffner & Marx and Hickey-Freeman suits similarly. (J.A. 25). At the time, Mr. Cooter assumed that this adequately explained Petitioner's belief that its survey with respect to Hart Schaffner & Marx suits was equally valid with respect to Hickey-Freeman suits. During oral argument before the District Court, Mr. Cooter reiterated that his clients had informed him that both lines of suits were marketed similarly and were subject to the same restraints. (J.A. 57). Because the District Court did not hold an evidentiary hearing, Mr. Cooter simply represented to the Court some of the information provided to him by his clients.

(J.A. 59). He explained Petitioner's investigation and the ways in which it corroborated the information provided by his clients, who were experienced in the industry. (J.A. 57-58).

Respondents offered no evidence to rebut Petitioner's representations, because they had none. They had declined to avail themselves of the opportunity offered by Petitioner to depose the lawyers who brought the class action Complaint. And, the District Court took no evidence. Moreover, Respondents were never able to explain how it was that some of its retailers publicly advertised that they were the exclusive dealers for Respondents' suits in their areas. (J.A. 18, 63). Respondents also have never denied that their retailers sell at relatively uniform prices or that those prices are inflated, as alleged in the Complaint. And, Respondents never challenged Petitioner's representation that it chose to dismiss its class action Complaint solely to conserve its resources for previously pending litigation, not because the Complaint lacked merit when it was filed.

The instant facts demonstrate how important it is for a court of appeals to require a district court to engage in careful fact finding as a prerequisite to imposing Rule 11 sanctions.[5] Petitioner urges that the clearly erroneous standard is the correct standard for appellate review of

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[5] The Association of Trial Lawyers of America's Amicus Curiae Brief, at 14-15, suggests that the clearly erroneous standard is not appropriate because sanctions are frequently imposed without a hearing and without fact findings. Indeed, it is difficult to ascertain from reported decisions the procedures used by most courts in Rule 11 cases. Petitioner submits, however, that a Rule 11 sanction ought to require minimal fairness, at least a minimal opportunity for a lawyer or litigant to dispute facts, and a finding based upon the evidence. If ATLA is correct—and if sanctions may be imposed in the absence of hearings, evidence and findings—it probably will not matter what standard an appellate court uses; review will be a farce, and Rule 11 will be the ultimate threat to trial lawyers.

disputed facts," and that this standard requires in the first instance that the district court make factual findings that purport to justify a Rule 11 award. As to Petitioner, the District Court made no findings on any of the essential points. It completely failed to address Petitioner's claim that its client had indicated that two lines of suits were fungible, leading any reasonable person to conclude that an investigation of one line was adequate to cover the other. The District Court also faulted Petitioner for failing to make a more extensive telephone inquiry, without making any findings as to the reasonableness of Petitioner's relying on its experienced clients, and on the fact that Respondents had been given an extension of time to review the draft Complaint and had identified not a single problem with it. In addition, the District Court made no effort to explain why Respondents should be permitted to conceal information prior to the filing of a Complaint and then suddenly to offer that information in support of a Rule 11 motion.[7]

[6] Now that this Court has held that a Rule 11 sanction is essentially a deterrent, *Pavelic & LeFlore*, 110 S.Ct. 456, it would seem that a district court ought to be required to carefully consider exactly what a lawyer did to decide whether a deterrent is required and, if so, what type of deterrent would be appropriate. A district court must reconstruct historical fact in Rule 11 proceedings in precisely the same way it must when deciding whether to grant injunctive relief, equitable remedies, or damages in a bench trial. The type of findings required by Fed. R. Civ. P 52 ought to be required in any Rule 11 proceeding in which an attorney's reputation may be at stake as well as his or her pocketbook.

[7] In *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986), the court reversed an award of sanctions pursuant to Rule 11 citing as a reason the district court's failure to "consider any misconduct on the part of defense counsel which may have contributed to the protraction of this lawsuit." In reviewing the sanctions against Petitioner, the Court of Appeals failed to consider the absence of findings as to the interaction between Petitioner and counsel for Respondents. Without any evidence to support its conclusion, the District Court simply asserted that plaintiff's counsel did not ask

Without careful fact-finding by a district court, it is impossible for a court of appeals to engage in any meaningful review. The instant case well demonstrates the importance of either *de novo* review or, at a minimum, careful abuse of discretion review[8] of the application of facts to the Rule 11 standard. Without such review, plaintiffs will be chilled from pursuing legitimate cases.

Incredibly, on the record before the Court, Respondents argue that the Court of Appeals did not rely upon an abuse of discretion standard in affirming the District Court and that there is no reason to suppose that its decision would have been different had it adopted the appellate standard proposed by Petitioner. Brief for Respondents at 30. It is true that the Court of Appeals did not explicitly defer to the factual findings or legal conclusions of the District Court. *Id.* at 31. This is because the District Court made no real findings of fact and declined to set forth any clear legal standards by

defense counsel about the factual basis for the Complaint. The District Court also failed to consider that the Respondents withheld facts regarding the draft Complaint until they filed their Motion to Dismiss and Rule 11 Motion. In fact, Petitioner represented quite the opposite, *i.e.*, the purpose for forwarding the Complaint to both in-house and outside counsel was to invite a discussion of all issues and to provide an opportunity for Respondents to offer any information that might cause Petitioner to reassess the Complaint it had drafted.

There is not one shred of evidence to suggest that Petitioner would not have further investigated any allegations made by Respondents. The record demonstrates the opposite. Once Respondents filed their affidavits, Petitioner did further investigation and discovered that Respondents' affidavits were not as convincing as they appeared on their face, and were in fact consistent with a pattern of price-fixing supported by exclusive dealing. (J.A. 20-21).

[8] The Association of Trial Lawyers of America, as amicus curiae, has argued for an abuse of discretion standard, but has urged that courts of appeals can only fulfill their appellate mandate if they make it clear that a district court abuses its discretion when it applies an incorrect legal standard. ATLA Brief at 15.

which to assess Petitioner's conduct. If the Court of Appeals had adhered to the review standard suggested by Petitioner, it is respectfully submitted that the Court of Appeals might well have reached a very different result. It certainly would have discussed and found significant the following:

> 1. That the defendant here was provided an opportunity to review the Complaint before it was filed, declined to identify what it now contends are obvious errors, and then filed a Rule 11 motion directed at the complaint.[8]
>
> 2. That the District Court imposed sanctions four years after the Rule 11 Motion was made, without identifying legitimate reasons for such an unwarranted delay and the circumstances that made the Rule 11 issue ripe long after all parties assumed it was moot.
>
> 3. That the Petitioner relied upon the expertise of its client and corroborated the client's information in deciding how extensive an investigation to conduct before filing a complaint.
>
> 4. That the District Court made factual assumptions that were unsupported by evidence and that were inconsistent with Petitioner's explanation of the factual basis for the complaint.

Petitioner respectfully submits that, had the Court of Appeals given these factors appropriate *de novo* consid-

[8] Even if a defendant is not absolutely barred from recovering Rule 11 sanctions when it has an opportunity to review a complaint before it is filed and declines to identify alleged errors, the Court of Appeals might have held that a defendant must demonstrate that any harm that it suffered from the complaint would inevitably have been incurred even if the defendant had notified the plaintiff of alleged errors before the complaint was filed. In this case, such a ruling would have precluded any sanctions, since Respondents have made no showing that the Complaint which was filed would have been in the same form had they suggested to Petitioner before the Complaint was filed the facts that were contained in affidavits filed in support of the motion to dismiss and the Rule 11 motion.

eration, it is inconceivable that it would have affirmed the decision of the District Court.

Petitioner joins in the observation of the Public Citizen Litigation Group, Brief Amicus Curiae, at 13:

> Defining the proper standard of review is not merely a question of picking among equally appropriate alternatives. Rather, the scope of review may not only determine the result of an appeal, but may sharply affect whether a sanction will be imposed in the first place. Litigation is inherently an adversarial process, in which tempers sometimes become short, lawyers occasionally overstep the grounds of civility in representing their clients zealously, and trial judges, like all human beings, develop animosities toward one party or one attorney in some cases. Rarely will the outcome on the merits be affected by such human frailties, but that cannot be said with confidence on the matter of sanctions, as indeed this case seems to suggest . . . . While no system of review can prevent all miscarriages of justice, applying a *de novo* standard will help assure that a trial judge's decision on a sanctions motion will be made for reasons that are proper under the law.

Respondents argue, Brief for Respondents, at 36, "*de novo* appellate review of mixed questions of fact and law, such as whether an attorney made a sufficient investigation before filing a complaint, would drain appellate resources without benefiting litigants in other cases." This is manifestly incorrect. Careful appellate review is not unduly burdensome if the district court makes appropriate findings and clearly identifies the legal standard it is applying. Respondents' reasoning also flies directly in the fact of this Court's articulated rationale for Rule 11, as recently set forth in *Pavelic*, *supra*. *Pavelic* reasoned that deterrence is the appropriate goal of Rule 11 sanctions. Petitioner respectfully suggests that there can be no reason for a Rule 11 sanction unless a district court, and a court of appeals on

review, can articulate a standard which has been violated and a rule to guide attorney practice. Unless this is possible, there can be no deterrence, and the use of Rule 11 is wasteful and possibly a deterrent to objectively reasonable actions by counsel fearful of after-the-fact sanctions by courts free to second-guess every move that counsel might make.[10]

If a district court makes careful findings of fact and articulates the rule of behavior which has been violated, appellate review is relatively simple: either the appellate court holds that the district court adopted a correct legal standard and correctly applied it to the facts, or the appellate court finds error in the choice of the standard or its application and reverses. Only where, as in the instant case, the district court fails to adequately find facts and completely fails to set forth the legal standard against which attorney behavior is to be assessed is *de novo* review difficult. And, in a case like the instant one, it is clear that any other type of review, including abuse of discretion review, leaves the bar without any guidance as to what an attorney is expected to do before filing a complaint when his client gives him information which is corroborated by investigation and potential defendants choose not to discuss a draft of the complaint before it is filed.

[10] Petitioner believes that the abuse of discretion standard of review adopted by this Court in *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988), is not appropriate in Rule 11 cases. Rule 11 sanctions threaten not only the reputation of sanctioned lawyers, but also the availability of legal services to the community. It is of vital importance that lawyers are not sanctioned in one court for behavior that is deemed proper in another. Such disparity would undermine a lawyer's willingness to zealously pursue legitimate cases and leave counsel unable to assure equal zeal in all courts. Unlike the Equal Access to Justice Act, 28 U.S.C. § 2412(d), at issue in *Pierce*, Rule 11 is not confined to sanctions against the United States, and Rule 11 sanctions raise possibilities of discrimination against lawyers and their clients in a variety of unpopular cases.

III. FED. R. APP. P. 38 AND 28 U.S.C. § 1912 PROVIDE ADEQUATE PROTECTION TO APPELLEES IN RULE 11 SANCTIONS APPEALS

Respondents appear to concede that Petitioner's appeal to the District of Columbia Circuit and its certiorari petition posed substantial issues, and they are unable to make any coherent argument for penalizing such appeals. Indeed, there is no persuasive argument for punishing nonfrivolous appeals in the Rule 11 context, when Fed. R.App.P. 38 and 28 U.S.C. § 1912 already provide substantial protection against all frivolous appeals. The rule and statute provide not only that a court may impose costs, including attorney's fees, upon a party for taking a frivolous appeal, but also that the court may double the costs in order to deter frivolousness.

As the Amicus Curiae Brief of the Association of Trial Lawyers of America, at 18-20, points out, in addition to rule 38 and § 1912, federal courts can use 28 U.S.C. § 1927 (sanctions for attorney misconduct), their inherent power, and Fed.R.App.P. 46(c) (disciplinary action against attorneys), to punish or deter counsel who burden appellate courts with meritless appeals. There is no need to construe Rule 11 to automatically require a lawyer or litigant who has been sanctioned to pay further fees and costs to an adversary simply because a legitimate appeal has been filed.[11]

The anomaly in Respondents' argument is clear. If a suit is successfully brought against a defendant for com-

[11] There is nothing in the history of Rule 11 to suggest that it was intended to be a general provision for attorney's fees like those found in statutory schemes that give a prevailing party a right to attorney's fees, as under the Civil Rights statutes. *See, e.g.*, 42 U.S.C. § 1988. Even under § 1988, the circuits are not uniform in shifting appellate fees. *See, e.g., Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985) (attorney's fees for appellate work of a prevailing defendant are not mandated by 42 U.S.C. § 1988 unless the plaintiff's appeal is frivolous, unreasonable or without foundation, even though not brought in subjective bad faith).

pensatory and even punitive damages, the defendant is entitled to appeal without penalty as long as the appeal is not frivolous. But, an attorney or litigant who is sanctioned under Rule 11 may not appeal without risking a penalty no matter how substantial the issues raised on appeal. Surely, this cannot be the reasonable intent of Rule 11 nor its most logical construction in the face of rules and statutes that on their face address under what circumstances fees are available when a party loses an appeal.[12]

Where an attorney's reputation is called into question by a Rule 11 sanction, or where an attorney or litigant is assessed a monetary sanction that could be appealed without penalty if it were treated as compensatory or punitive damages, a nonfrivolous appeal should not be penalized. Each of Respondents' arguments is an argument for general fee shifting, and none can be confined to Rule 11 cases. As various amici point out, there is nothing in the history or language of Rule 11 to suggest that it was intended to be a general fee-shifting statute, let alone that the Rules Enabling Act would authorize any such interpretation.[13]

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[12] Petitioner has pointed out in its opening brief, at 43-44, the imbalance that Respondents' argument would produce between unsuccessful Rule 11 movants who appeal and litigants or lawyers who are sanctioned and appeal. This imbalance is also discussed in the Amicus Curiae Brief of the Association of Trial Lawyers of America, at 24-26, and the Brief Amicus Curiae of Public Citizen, at 18, but not in Respondents' Brief.

[13] Respondents seek to avoid the fact that, since the appeal was not frivolous, an award in the Court of Appeals under Rule 38 would have been improper. According to Respondents, they can receive fees for the appeal under Rule 11, although they admit that it applies only to district court proceedings, since those fees were incurred "because of" Petitioner's alleged violation of Rule 11 which, they argue, is no more than what the Rule allows. Aside from this obviously strained reading of the Rule, its one-way and unequal benefits for Rule 11 victors, and its presumed application to fees incurred in this Court, it is more than just a little bit remarkable that nowhere in the Advisory Committee Notes is there even a hint that a whole new basis for awarding attorneys' fees on appeal was tucked into those two little words. Thus, even if form were to prevail over substance, and it were proper to decide the question by focusing on the court in which the fees were awarded, rather than the one where the services were rendered, there is simply no basis in the rule or elsewhere to allow the automatic recovery of all fees expended in defending a sanctions award.

CONCLUSION

For the reasons stated in both the opening brief and in this reply, Petitioner asks the Court to reverse the judgment of the Court of Appeals and to hold that the sanctions imposed in this case were improper.[14]

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[14] Petitioner suggests to the Court that the award of sanctions against a law firm was plain error under *Pavelic*, but that the issues which the Court has agreed to review are substantial and ought to be decided so that Petitioner and other counsel will have guidance as to the relationship of Rules 41(a)(1)(i) and 11, the scope of appellate review, and the automatic imposition of appellate sanctions. If the Court agrees with Petitioner that its voluntary dismissal barred the District Court from awarding sanctions, the *Pavelic* issue will be moot. If the Court agrees with Petitioner that an award of attorney's fees following a nonfrivolous appeal is improper, the *Pavelic* issue will be at least partially moot. And, if the Court agrees with Petitioner that the Court of Appeals used the wrong standard of review, any remand could include consideration of the question whether *Pavelic* and the plain error doctrine should preclude a sanctions award in this case.

Respectfully submitted,

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